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IN THE

Supreme Court of the United States

October Term, 1956

No. 398

LOUIS R. DEL VECCHIO, JR.,
Petitioner

vs.

THE PENNSYLVANIA RAILROAD COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MURRAY L. SCHWARTZ,
2635 Fidelity-Phila. Trust Bldg.,
Philadelphia 9, Pennsylvania,
Counsel for Petitioner.

HARRY A. DEMAR,
812 Western Saving Fund Bldg.,
Philadelphia 7, Pennsylvania,
HARRY R. KOZART,
1100 Lewis Tower Bldg.,
Philadelphia 2, Pennsylvania,
Of Counsel.

Murrelle Printing Company, Law Printers, 201-3 Lockhart St., Sayre, Pa.

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STATUTE:

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit (Pet. 19) is not yet reported; the oral opinion of the District Court is not reported (136a).[1]

JURISDICTION

The judgment of the Court of Appeals was entered on May 15, 1956 (Pet. 25). On August 10, 1956, by order of Mr. Justice Clark, the time for filing a petition for writ of certiorari was extended to September 12, 1956 (Pet. 26). Jurisdiction of this Court is based on 28 U.S.C. 1254(1).

[1] References to the appendix record filed by petitioner in the court below are indicated by "a". Both the appendix record filed by petitioner and that filed by respondent are attached hereto.

QUESTIONS PRESENTED

As part of the services required under its tariffs, a railroad transfers coal carried in coal cars to vessels moored at its pier. The unloading operation takes place wholly with railroad equipment on railroad property. A separate corporation has contracted to perform the details of the unloading operation, although the time and place of the unloading are designated by the railroad, and the power to terminate the operation and the contract at any time because of its common carrier obligations is retained by the railroad. In the course of the unloading operation, a signalman hired and supervised by the intermediate corporation is seriously injured.

The questions presented are:

1. Are Sections 1 and 5 of the Federal Employers' Liability Act limited to conceptual, common law notions of "agency" and "independent contractor", so that the employee is entitled to the benefits of the Act as an "employee of the railroad", only if the intermediate corporation meets the traditional criteria of "agent", as opposed to "independent contractor"?

2. If the common law dichotomy between "agent" and "independent contractor" is applied, is the employee, nevertheless, an "employee of the railroad" for the purposes of the Federal Employers' Liability Act?

3. In either event, is the employee entitled to have a jury decide whether, for the purposes of the Federal Employers' Liability Act, he was an employee of the railroad at the time he was seriously injured in the performance of his duties?

STATUTES INVOLVED

Section 1 of the Federal Employers' Liability Act, 35 Stat. 65, 45 U.S.C. §51, as amended, provides in relevant part:

> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . , for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.
>
> "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

Section 5 of the Act, 45 U.S.C. §55, provides:

"Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided*, That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought."

STATEMENT OF FACTS

Petitioner was seriously injured in November, 1951, in the course of his employment as a signalman at the tipple of the coal dumping station on respondent The Pennsylvania Railroad Company's Greenwich Coal Pier at Philadelphia, Pennsylvania.

In his Complaint under the Federal Employers' Liability Act, 35 Stat. 65, 45 U.S.C. §51 *et seq.*, to recover damages for his personal injuries, petitioner alleged, *inter alia*, that he had been employed by respondent Railroad, through its corporate agent, the Northern Contracting Company. Accordingly, petitioner contended he was entitled to the benefits of the Act as an employee of the Railroad. This allegation was denied by the respondent. At the conclusion of the presentation of petitioner's case, the

District Court (Welsh, J.) granted respondent's motion for a directed verdict on the ground that petitioner had failed to introduce sufficient evidence to warrant submission of the issue of his employment by respondent to a jury. (136a). On appeal, the Court of Appeals for the Third Circuit affirmed. (Pet. 24).

The respondent, The Pennsylvania Railroad Company, is engaged in the transportation of goods and commodities in interstate commerce. In pursuance thereof, it transports coal to various consignees by carriage over its lines, which is then transshipped by barges and other types of vessels. The coal originates on both its own line and the lines of other carriers[2] and is carried by the Railroad to its own piers where the coal is transferred to vessels for use as fuel or for further shipment.

In Philadelphia, Pennsylvania, coal cars are brought to respondent's classification yard, where they are transferred as needed to a "thaw house", where they are thawed if frozen. (22a-23a). The cars which contain the coal to be loaded on the vessels at the pier are then ridden by gravity and a mechanical device known as a "pig" or a "barney" to the tipple or coal dumping mechanism at the end of the pier. The cars are tipped over by this mechanism and the coal deposited in the holds of the vessels. The empty car is then righted and ridden back to a storage point from which it is ultimately returned to the line of the respondent. (119a-121a; 50a-51a).

The Greenwich Coal Pier in Philadelphia, Pennsylvania has been in operation since 1928. (8a). At the time the

[2] The coal car which injured plaintiff had originated on the Lehigh Valley Railroad and was routed by the respondent over its line to the Greenwich Coal Pier for export. (7a).

dock was opened, the Railroad entered into a contract with the Northern Contracting Company, pursuant to the terms of which the handling of coal from the time the cars are placed in the thaw house until the time the coal is deposited in the holds of the vessels was purportedly put in the charge of Northern. Although the Railroad performs this operation with its own employees at all its other coal piers (10a), the contract was allegedly entered into because of the "expert knowledge and experience" of Northern[3] (139a).

In the main, the contract provides as follows: All equipment, facilities and materials for the unloading operation are furnished by the Railroad. (140a) The Railroad furnishes the switching service necessary for placement of cars. (142a) Northern is responsible for the handling of cars to and from the coal dumping machine and for the handling of and ordinary repairs to the equipment. (140a-141a) Northern carries various types of insurance, including indemnity insurance for injuries resulting from the operation of the equipment (142a-143a), and to indemnify the Railroad from any claims arising out of such injuries (146a, 152a-154a). Northern is required to keep records relating to its services, which are available for examination by the Railroad at any time (143a-144a). Northern is responsible for general policing of a specific area, which has purportedly been set aside for the operation (143a-144a, 150½a).

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[3] In fact, petitioner had had no previous experience when he was hired by Northern. (119a; See also 133a-134a). Further, despite Northern's supposed "expertise", it was the Railroad which was in charge of all major repairs to the equipment. (32a, 128a).

Northern is paid for the unloading and loading operations and "performing of all other services which the Railroad is obligated to perform under its tariffs," on a unit basis for the handling of the coal transshipped by vessel (144a-145a); and for the handling of "bunker coal into tug boats and steamers, and for all other services not enumerated . . . but requested by the Railroad" on a cost plus basis (145a).

Although the contract is a year-to-year contract, "because of the common carrier obligations of the Railroad", the Railroad reserves the right to terminate it "forthwith" if Northern fails in its performance of the contract (15a, 148a-149a).

The contract further provides that Northern is to be considered "an original private and independent contractor" and all persons employed by it are to be paid by it and are "subject to its exclusive authority, supervision, direction and control" (147a).

In practice, as the record shows, the operation takes place as follows: Copies of waybills for the coal cars which are received in the Railroad's yard are given to its agent in charge of the coal pier. From time to time, he orders cars containing different types of coal to be transferred to the thaw house, so as to satisfy orders received for coal to be delivered to the vessels at the pier, notice of whose arrival is also given to the Railroad's agent. After these cars are transferred to the thaw house, the agent notifies Northern, whose employees transfer the cars to the tipple, dump the coal into the vessels, and return the cars to a point where they are ultimately picked up and returned to the Railroad's line (24a-28a, 87a-88a).

Statement of Facts

Although Northern appears to have immediate supervision of the details of the unloading operation, all property involved or used in the operation is owned by the Railroad, including the classification yard, the coal pier, the buildings thereon and all of the equipment used by either the direct employees of the Railroad or by the employees of Northern [4] (8a, 15a). The responsibility for carrying the coal and delivering it to the consignee is that of the Railroad (45a, 78a); anything having to do with the pier or the loading of coal, comes under the direction of the Railroad's agent (28a). He and his fellow employees at all times have free access to the pier and the coal loading facilities (32a). He decides when the coal dock is to be operated (39a); he can direct Northern as to which side of the loading dock is to be used (80a); and he can at any time stop loading operations (79a-80a, 82a).

There is substantial duality of control over certain phases of the operation. Thus, it is the railroad which is responsible for making major repairs to the equipment (32a, 128a), and for taking off defective railroad cars before they are used by the employees of Northern (21a-22a, 87a-88a, 94a, 108a). Copies of records kept by Northern are forwarded to the Railroad (12a, 38a, 143a-144a). The office building on the pier was shared by the Railroad and Northern at the time of the injury (29a-30a). Although a given area was purportedly set off by the contract for the use of Northern employees, the Railroad's agent could at any time enter this area (32a) and in fact Northern's employees habitually and frequently entered into other areas of the yard in the course of their employment (88a;

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[4] These items appear as assets on the respondent's valuation reports filed with the Interstate Commerce Commission (15a).

see also 85a, 105a-106a). When it appeared necessary to operate the equipment overtime, the decision so to do was jointly made by the Railroad's agent in charge of the pier, his supervisor, and the Northern supervisor (42a).

REASONS FOR GRANTING THE WRIT

The court below has decided an important question of the coverage of the Federal Employers' Liability Act in a way which is inconsistent with the Congressional purpose manifested by the Act and which is in direct conflict with the decisions of the Court of Appeals for the Sixth Circuit, as well as the decisions of the State courts of Illinois.

1. What is here involved is a basic question of the scope and coverage of the Federal Employers' Liability Act: whether an employee who is engaged in performing essential railroad common carrier functions—in this case the unloading of coal from railroad cars to vessels for further shipment or use as fuel—with railroad equipment on railroad property, is to be deprived of the benefits of the Act solely because of the interposition of an "independent contractor" between the railroad and the employee. Questions of the scope of the Act are important enough for this Court's consideration. See *Reed v. Pennsylvania R. Co.*, 351 U. S. 502 (1956); *Southern Pacific Co. v. Gileo*, 351 U. S. 493 (1956).

A. The issue as seen by the court below is itself sufficient to warrant this Court's consideration: whether, when tested by the traditional common-law dichotomy between agent and independent contractor, petitioner was an "employee" of the Railroad so as to be entitled to the

benefits of the Act. This determination of the coverage of the Act, as measured by common law standards, would appear at least as important as the determination of issues of common law negligence under the Act. See, *e.g. Anderson v. Atlantic Coast Line Railroad Co.*, 350 U. S. 807 (1955); *Strickland v. Seaboard Air Line Railroad Co.*, 350 U. S. 893 (1955); *Urie v. Thompson*, 337 U. S. 163 (1949).

Section 1 of the Act (*supra*, p. 3) provides that the Act is available to

> "any person suffering injury while he is employed by [a common carrier by railroad] while in . . . commerce [between the several States]."

The court below apparently agreed that if Northern, which had employed petitioner, was merely the "agent" of the Railroad, then petitioner was an "employee" of the Railroad within the meaning of Section 1. The court below also properly recognized that the contract between Northern and the Railroad was not determinative of the true relationship between the two parties. Indeed, Section 5 of the Act (*supra*, p. 4) expressly provides:

> "Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: . . ."

That the parties may not have intended to deprive petitioner of the benefits of the Act by their arrangement makes Section 5 no less applicable. As this Court, speaking through Mr. Justice Hughes, stated in *Phila., Balt. & Wash. R. R. v. Schubert*, 224 U.S. 603, 613 (1912):

> "The words, 'the purpose or intent of which shall be to enable any common carrier to exempt itself from

any liability created by this act', do not refer simply to an actual intent of the parties to circumvent the statute. The 'purpose or intent' of the contracts and regulations, within the meaning of the section, is to be found in their necessary operation and effect in defeating the liability which the statute was designed to enforce. Only by such general application could the statute accomplish the object which it is plain that Congress had in view."[5]

As the foregoing Statement of Facts shows, Northern was little more than the agent of the Railroad, even when measured by the common law standard of agency. It was the Railroad's common carrier work which was being done on the Railroad's property. It was the Railroad's equipment which was solely used. Northern was required to maintain certain records for the Railroad; facilities such as the office building were shared; Northern employees regularly, in the course of their employment, used the space purportedly reserved for the Railroad. The Railroad determined when and where the unloading was to take place. See, generally, pp. 6-9, *supra*.

The erroneous decision of the court below that Northern was an "independent contractor" is not an isolated factual situation which this Court will not in the ordinary course review. The question of the coverage of the Federal

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[5] Section 5 has, of course, not been limited to contracts dealing with waiver of claims (cf. *Duncan v. Thompson*, 315 U. S. 1 (1942), where this Court discussed the history and purpose of Section 5), but has been applied to such procedural questions as venue, *Boyd v. Grand Trunk W. R. Co.*, 338 U. S. 263 (1949). The lower courts have consistently applied Section 5 to questions of the employer-employee relationship involved here. See cases cited *infra*, p. 12.

Employers' Liability Act, as measured by the agent-independent contractor test, recurs frequently in practically nondistinguishable circumstances with varying results,[6] which this Court should clarify.

It should also be emphasized that the court below refused to let the question whether the Railroad was petitioner's employer go to a jury. At the very least, the evidence in this record seems more than adequate to warrant submission of the issue to a jury. Cf. *Strauss v. Reading Co.*, 14 F.R.D. 457 (E.D. Pa., 1953). Even as this Court stated with regard to an issue of negligence in *Bailey v. Central Vermont Ry. Co.*, 319 U. S. 350 (1943), at 354:

> "To deprive these workers of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them."

B. The basic error of the court below was probably its application of concepts of agent and independent contractor to the Federal Employers' Liability Act. It is petitioner's position that the test of the application of the Act should not depend on such conceptual notions, but should be that of its original purpose: whether the employee is performing essential common carrier functions

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[6] Among the State cases, compare *Moore v. Industrial Commission of Ohio*, 49 Ohio App. 386, 197 N.E. 403 (1934); with *Klar v. Erie R. Co.*, 118 Ohio 612, 162 N.E. 793 (1928), app. dismissed, 279 U. S. 818; *Downs v. B. & O. R. Co.*, 345 Ill. App. 118, 102 N.E. 2d 537 (1951), and cases cited therein, with *Orange v. Pitcairn*, 280 Ill. App. 566 (1935); *State v. Bates & Rogers Constr. Co.*, 91 Wash. 181, 157 Pac. 482 (1916), with *Reynolds v. Addison Miller Co.*, 143 Wash. 271, 255 Pac. 110 (1927); *Drago v. Central R. Co.*, 93 N.J.L. 176, 106 Atl. 803 (1919), cert. den. 251 U. S. 553.

See also federal cases cited *infra*, p. 15; see, generally, Note, 30 A.L.R. 2d 517 (1953).

using railroad equipment on railroad property.[7] Cf. *Reed v. Pennsylvania R. Co.; Southern Pacific Co. v. Gileo, supra.*

There is no doubt that the petitioner was engaged in the performance of the Railroad's common carrier obligations. Thus, Paragraph 9 of the contract between the Railroad and Northern expressly states that Northern is to receive as compensation:

> "(a) For unloading cargo coal and coke from cars and loading and trimming the same into vessels, with mechanical trimmer, and performing all other services *which the Railroad is obligated to perform under its tariffs currently in effect in the elevating, dumping, trimming or other handling of this coal and* coke, except unloading and trimming bunker coal, the sum of Ten and one-half cents (10½¢) per ton for coal, and Seventeen cents (17¢) per ton for coke—net or gross as rated." (Emphasis supplied).

Paragraph 15 of the Agreement provides that "because of the common carrier obligations of the Railroad," the Railroad may terminate the agreement "forthwith" in the event of the failure of Northern to perform.

Viewed broadly, what has happened here has been that the Railroad has attempted, with indifferent success

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[7] Examples of how courts have looked to the purposes of other statutes in comparable factual circumstances are numerous. See, *e.g., McComb v. McKay*, 164 F. 2d 40 (8 Cir. 1947) (Fair Labor Standards Act); *Wabash R. R. Co. v. Finnegan*, 67 F. Supp. 94 (N.D. Ohio, 1946) (Carriers' Taxing Act of 1937); *Railroad Retirement Board v. Duquesne Warehouse Co.*, 326 U. S. 446 (1946) (Railroad Retirement Act of 1937, Railroad Employment Insurance Act of 1938).

(see *supra*, pp. 6-9) to isolate one aspect of the services which it is required to render under its tariffs and to place those services in the hands of a separate contractor. This attempt to chop off a relatively small portion of respondent's common carrier obligations should not serve to deprive petitioner of the benefits of the Act.

As this Court stated in *Reed v. Pennsylvania R. Co.*, *supra*:

> "The statute commands us to examine the purpose and effect of the employee's function in the railroad's interstate operation. . ."
>
> (pp. 506-507)

See also *Southern Pacific Co. v. Gileo*, *supra*.[7a]

Petitioner submits that the question of the proper standard is an important one. It is a question which has obviously caused difficulty in the large number of cases which has arisen in this general situation. See cases cited *supra*, p. 12, and *infra*, p. 15. If the common law standard is to be applied then petitioner believes that he was an employee of the Railroad for the purposes of the Act. Whether that standard should be applied is itself an important question which this Court should resolve.

[7a] In this connection, the court below erred in relying upon this Court's decision in *Chicago R.I. & P.R. Co. v. Bond*, 240 U. S. 449 (1916). Apart from the obvious factual distinctions, it is crucial that petitioner was engaged in the operation of transporting the commodity coal from one point to another, pursuant to the Railroad's tariffs and common carrier obligations, while in *Bond*, the plaintiff's job was to furnish an auxiliary service to the Railroad itself, to supply coal to it, as he did for a number of concerns other than the railroad. Indeed, although the instant contract asserts that respondent's purpose is to employ the expertise of Northern in handling coal, the fact is that respondent uses its own employees for the identical work at its other ports.

Reasons for Granting Writ

2. The decision of the court below, like its earlier decisions,[8] is in clear conflict with the decisions of the Court of Appeals for the Sixth Circuit,[9] and particularly in direct conflict with the decision of that Court in *Pennsylvania R. Co. v. Barlion*, 172 F. 2d 710 (6 Cir., 1949).

In the *Barlion* case, the railroad had arranged with an "independent contractor" to perform essential common carrier unloading, marking and reloading operations. In the instant case, the "independent contractor" performs essential common carrier functions of unloading and loading. In both cases, an employee of the "independent contractor" was injured in the performance of his duties and brought suit under the Federal Employers' Liability Act. In the *Barlion* case, the Court of Appeals for the Sixth Circuit, in following its earlier decisions, concluded that the independent contractor was merely the agent of the Railroad and therefore, that the employee was entitled to bring suit under the Act, as an employee of the Railroad.

The court below attempted to distinguish the *Barlion* case, as well as the earlier Sixth Circuit cases, on the grounds that (Pet. 24) "all of the contracts involved were cost-plus and there was evidence that the railroad con-

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[8] Cf. *Shaw v. Monessen Southwestern Ry. Co.*, 200 F. 2d 841 (3d Cir. 1953); *Docheney v. Pennsylvania R. Co.*, 60 F. 2d 808 (3 Cir. 1932). See also decisions of the Ninth Circuit, *Dougall v. Spokane, P. & S. Ry. Co.*, 207 F. 2d 843 (9 Cir. 1953), cert. den. 347 U. S. 904; *Norman v. Spokane, P. & S. Ry. Co.*, 192 F. 2d 1020 (9 Cir. 1951), cert. den. 342 U. S. 945; *Gauldin v. Southern Pac. Co.*, 78 F. Supp. 651, affd. per curiam, 174 F. 2d 1022 (9 Cir. 1949).

[9] *Pennsylvania R. Co. v. Roth*, 163 F. 2d 161 (6 Cir. 1947), cert. den. 332 U. S. 830; *Cimorelli v. N. Y. Cent. R. Co.*, 148 F. 2d 575 (6 Cir. 1945); *Erie R. Co. v. Marque*, 23 F. 2d 664 (6 Cir. 1928).

cerned exercised some actual control and supervision of the performance of the service". But there appears no difference between the amount of control and supervision which The Pennsylvania Railroad exercised over the independent contractor in the *Barlion* case and the control which The Pennsylvania Railroad exercised over Northern in the instant case.

Further, the court below apparently misread the *Barlion* case as involving a cost-plus contract. In *Barlion*, the Court of Appeals for the Sixth Circuit expressly contrasted its decision in the *Roth* case on this very point and stated (172 F. 2d at 711):

> "In the Roth case, the railroad paid the contracting company on a cost-plus-fixed-fee basis, based on monthly statements submitted to and certified by the division engineer of the railroad company. In the instant case, Art Schreck, Inc. was paid for its services in lump sum payments."

Moreover, even had the *Barlion* case involved a cost-plus contract, this would not be a distinguishing factor. When a railroad publishes a tariff which includes unloading or loading services, it obviously takes into consideration the cost of those services to it, whether based on a cost-plus or a unit contract. There is nothing in a cost-plus contract which of itself transforms a relationship of "agent" to one of "independent contractor". Certainly this difference should not permit one and prevent another injured employee from deriving the benefits of the Federal Employers' Liability Act.[10]

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[10] Moreover, if a cost-plus contract is of any significance, the contract in this case itself contained a cost-plus provision; for the

It is therefore clear that the decision of the Court of Appeals for the Third Circuit in the instant case is in direct conflict with the decision of the Court of Appeals for the Sixth Circuit in the *Barlion* case.

Finally, although not a conflict of decisions within the meaning of the Rules of this Court, the decision below is also in direct conflict with the decision of the Appellate Court of Illinois in *Downs v. B. & O. R. Co.*, 345 Ill. App. 118, 102 N.E. 2d 537 (1951). See also *Moore v. Industrial Commission of Ohio*, 49 Ohio App. 386, 197 N.E. 403 (1935).

In the *Downs* case, the plaintiff was the nominal employee of an "independent contractor", which had entered into a contract, similar in all important respects to the contract between Northern and the Railroad here, for the unloading of ore from the holds of vessels by a mechanical device into railroad cars at the dock of the Railroad. All the property was that of the Railroad. The operation was of course a segment of the common carrier obligation of the Railroad to carry the ore to the consignee. Indeed, the only possibly relevant difference between the *Downs* case and the instant case is the fact that in the *Downs* case the contract was cost-plus, and, as shown above, this should make no difference in the determination whether the railroad is the employer of the employee who is injured on railroad property performing the railroad's common carrier functions, using the railroad's equipment. The Illinois court, relying in part upon Section 5 of the Act, allowed a verdict and judgment for the employee under the Act to stand.

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loading of coal to be used as fuel. Although this aspect of the contract had not been of substantial importance in recent years, once it had been and the nature of the work performed by the employees of Northern had not changed during this period of time.

CONCLUSION

Many decisions of the lower courts, both state and federal, deal with the question of the right of an employee to recover under the Federal Employers' Liability Act for injuries sustained in the course of his employment, where, although he has been hired by an "independent contractor" and is substantially under that contractor's immediate control, he is engaged in performing essential common carrier obligations on Railroad property, using Railroad equipment. The court below has decided that important question erroneously, and in a way which is in direct conflict with the decisions of the Court of Appeals for the Sixth Circuit, as well as with the decisions of the State Courts of Illinois.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Murray L. Schwartz,
Counsel for Petitioner,
2635 Fidelity-Phila. Trust Bldg.,
Philadelphia 9, Pennsylvania.

Harry A. Demar,
812 Western Saving Fund Bldg.,
Philadelphia 7, Pennsylvania,

Harry R. Kozart,
1100 Lewis Tower Building,
Philadelphia 2, Pennsylvania.

APPENDIX

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 11,766

LOUIS R. DEL VECCHIO, JR.,
Appellant,

v.

THE PENNSYLVANIA RAILROAD COMPANY.

Appeal from the United States District Court for the Eastern District of Pennsylvania.

Argued April 10, 1956

Before BIGGS, *Chief Judge* and MCLAUGHLIN and STALEY, *Circuit Judges.*

OPINION OF THE COURT
(Filed May 15, 1956)

By MCLAUGHLIN, *Circuit Judge.*

Plaintiff-appellant was badly hurt as the result of an occupational accident. He sued appellee as his employer under the Federal Employers' Liability Act, 45 U.S.C.

Sections 51-60. On the primary question of whether he was such employee, the district judge ruled he was not and directed a verdict in favor of defendant. Plaintiff appeals.

Appellant was hired as a brakeman in 1951 by Northern Contracting Company, a Delaware corporation. That company, under a written contract with appellee, handled coal for the latter at its Greenwich Pier, Philadelphia, Pennsylvania. The coal was transported to the pier in railroad cars. Thereafter Northern removed it from the cars and loaded it for transshipment into vessels docked at the pier. In the fall of 1951, appellant became a signalman working at the tipple of the coal dumping station on the pier. On November 15, 1951, while so engaged, he was crushed between a coal car and the barrel of the tipple mechanism.

The agreement between Northern and the railroad is dated January 2, 1940. It was supplemented on July 6, 1946 and modified October 29, 1952. The supplement changed certain insurance features of the original.[1] The modification is merely referred to in an answer to an interrogatory and is not pertinent. The original agreement runs twelve printed pages. Its preamble states the reason for hiring the contractor is because of its experience and expert knowledge of the particular kind of work. The twelfth paragraph is important to the present problem. It reads:

> "The work to be performed by the Contractor under this agreement is to be done promptly and ade-

[1] While not too important on the issue of Northern's status, the insurance conditions in the original contract and more strongly as appearing in the supplemental agreement, do point to the independent entity of Northern.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CERTIFICATE

I, Leo A. Lilly, Clerk of the United States District Court for the Eastern District of Pennsylvania, do hereby certify that the attached photograph is a true and correct copy of the original Exhibit "P-1" in the case of Louis R. Del Vecchio, Jr. v. The Pennsylvania Railroad Company, Civil Action No. 13948.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Philadelphia this 25th day of September, A.D. 1956.

LEO A. LILLY
Clerk

By

GILBERT W. LUDWIG
Chief Deputy Clerk

quately in all respects, and in the performance of such work the Contractor will furnish all labor and supervisory forces of every kind and description. And it is expressly understood and agreed that the Contractor shall be and remain an original private and independent contractor, hereunder, and shall employ, pay from its own funds, and discharge all persons engaged in the performance of such work, and all such persons shall be and remain the sole employees of the Contractor, and subject to its exclusive authority, supervision, direction and control."

There is nothing in the agreement at all indicative of Northern being an instrumentality or sub-agent of appellee.

We agree that if the contract language is contrary to the true relationship between Northern and the railroad it of course does not govern. Cimorelli v. N. Y. Central R. Co., 148 F. 2d 575, 578 (6 Cir. 1945). Northern's status depends upon the facts.

Those facts are simple. Northern neither had nor has any connection with the railroad except under its contract. There is no interlocking directorate or stock ownership by appellee. There was close coordination between the railroad and Northern in the contract undertaking. The railroad would advise Northern that certain identified coal was to be loaded on a named vessel expected to be available at a stated time. Generally the coal as it arrived in cars was placed in the pier thaw house, where in cold weather it was thawed out. After that Northern was advised what tracks the cars were on and furnished with their identification marks and weights. Northern then took charge and

moved the cars to the dumper where it loaded the coal into the designated vessel.[2]

The assistant agent for the railroad, in charge of his employer's coal business on the pier, was a witness for the plaintiff. He made it very clear that though he instructed Northern what coal to take and where to deliver it, he never had anything to do with the manner in which Northern's results were accomplished. At the time of the accident he occupied an office on the pier area in the same building wherein Northern's superintendent, with whom he dealt, also had quarters. None of Northern's records give any fair inference that it was other than a self sufficient organization functioning entirely separate from the railroad. In connection with its work Northern used Pennsylvania equipment and made repairs to its. It cleaned the premises and maintained fire protection and watchmen. On one occasion when its men were not busy they painted the little office building which was owned by appellee and in which at the time, its superintendent had his office. These particulars and the others alluded to by appellant are not here inconsistent with the inescapable fact that Northern, during the period Mr. Del Vecchio suffered his injuries, was an independent contractor and associated with the railroad solely on that basis.

The decided cases sustain this view. The facts in Chicago, Rock Island & Pacific Ry. Co. v. Bond, Admr. of Turner, 240 U.S. 449, 455, 456 (1916), were quite similar to the situation before us. The court there held:

---

[2] We are not concerned whether Northern was a common carrier in those operations as only the railroad is being sued in this action.

"There was, it is true, and necessarily, a certain direction to be given by the company, or rather, we should say, information given to Turner. But the manner of the work was under his control, to be done by him and those employed by him. He was responsible for its faithful performance and incurred the penalty of the instant termination of the contract for non-performance.

* * * * * * * *

"The railroad company, therefore, did not retain the right to direct the manner in which the business should be done, as well as the results to be accomplished, or, in other words did not retain control not only of what should be done but how it should be done."

The usual tests evidencing appellant's bona fide employment by Northern are all present. Northern selected him, hired him, paid him, could discharge him and directed and controlled his work. Stevenson v. Lake Terminal R. Co., 42 F. 2d 357 (6 Cir. 1930). The cooperation and assistance furnished by the railroad helped enormously in the successful accomplishment of Northern's task but it was Northern who controlled the way it performed its job. Cf. Gaulden v. Southern Pacific Co., et al., 78 F. Supp. 651 (D.C.N.D. Cal. 1948), affd. per curiam 174 F. 2d 1022 (9 Cir. 1949). See also Dougall v. Spokane, P. & S. Ry. Co., 207 F. 2d 843 (9 Cir. 1953), cert. den. 347 U.S. 904; Shaw v. Monessen Southwestern Ry. Co., 200 F. 2d 841 (3 Cir. 1953); Docheney v. Pennsylvania R. Co., 60 F. 2d 808 (3 Cir. 1932).

In the Cimorelli decision, supra, Pennsylvania R. Co. v. Barlion, 172 F. 2d 710 (6 Cir. 1949), and Pennsylvania

R. Co. v. Roth, 163 F. 2d 161 (6 Cir. 1947), cert. den. 332 U.S. 830, all of the contracts involved were cost plus and there was evidence that the railroads concerned exercised some actual control and supervision of the performance of the services. Those cases and others of the type conclude from the facts that the contractor was merely an adjunct of the railroad. Here the facts reveal that this contractor had an independent status and that appellant was its bona fide employee.

The judgment of the district court will be affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS

For the Third Circuit

No. 11,766

Louis R. Del Vecchio, Jr.,

Appellant,

vs.

The Pennsylvania Railroad Company

On Appeal from the United States District Court for the Eastern District of Pennsylvania.

Present: Biggs, *Chief Judge*, and McLaughlin and Staley, *Circuit Judges*.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed, with costs.

Attest:
Ida O. Creskoff
Clerk

May 15, 1956

Received & Filed
May 15, 1956
Ida O. Creskoff, *Clerk*

SUPREME COURT OF THE UNITED STATES

No. ——, October Term, 1956

Louis R. Del Vecchio, Jr.

vs.

The Pennsylvania Railroad Company

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 12th, 1956.

(s) Tom C. Clark
Associate Justice of the Supreme Court of the United States.

Dated this 10th day of August, 1956.

FILED
OCT 5 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1956.

No. 398.

LOUIS R. DEL VECCHIO, JR.,
Petitioner,

v.

THE PENNSYLVANIA RAILROAD COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

PHILIP PRICE,
ARTHUR E. NEWBOLD, III,
BARNES, DECHERT, PRICE, MYERS & RHOADS,
1600 Three Penn Center Plaza,
Philadelphia 2, Pa.,
Attorneys for Respondent.

International, 236 Chestnut St., Phila. 6, Pa.

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IN THE

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OCTOBER TERM, 1956.

No. 398.

LOUIS R. DEL VECCHIO, JR.,
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THE PENNSYLVANIA RAILROAD COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Third Circuit is reported at 233 F. 2d 2. The opinion of the District Court, delivered from the bench, has not been reported.

JURISDICTION.

The judgment of the Court of Appeals was entered on May 15, 1956. On August 10, 1956, the time for filing a petition for writ of certiorari was extended to September 12, 1956. Jurisdiction of this Court is based on 62 Stat. 928, 28 USC § 1254(1).

QUESTION PRESENTED.

A railroad company erected a large plant containing machinery which was capable of rotating loaded coal cars and dumping their contents into the holds of ships where it was trimmed by mechanical trimmers. It hired an independent company to operate the plant and the trimmers, leaving to it all details of control and supervision of the operation and of hiring and firing the employees. The question presented is:

May an employee of the independent company who was injured in the course of his employment by it, and while under its sole supervision, direction and control, maintain an action against the railroad company under the Federal Employers' Liability Act?

STATEMENT OF THE CASE.

Respondent, The Pennsylvania Railroad Company, in 1928, erected a large coal dumper on its coal pier at Greenwich Point, Philadelphia (100a). Coal cars placed in the dumper could be overturned bodily and the contents poured into machinery which conveyed it into the holds of vessels (120a). Mechanical trimmers were then used to trim the coal in the holds (72a-73a, Photograph, P-1).

The railroad entered into a contract with Northern Contracting Co. under the terms of which it agreed to operate the entire plant, including the dumper and the mechanical trimmers, it having prior thereto operated for respondent a smaller dumper nearby (101a).

The contract in effect between the railroad and Northern at the time of the accident in suit provided that Northern should do the loading and trimming within a specified area and at its own expense (140a). It was to furnish all labor required for the work and for ordinary repairs (141a), and indemnify the railroad for the consequences of its negligence (152a-153a). The railroad was required to

place the cars at a convenient point where they could be taken over by Northern's men, but the remainder of the operation, which included the thawing of the coal, the movement of the cars mechanically and by gravity to the dumping machine, the dumping of the cars, and their return from the dumping machine to other tracks where they were delivered empty to the railroad, was to be performed by Northern (142a) without any supervision or control by the railroad (50a-58a). Northern was required to keep the premises reasonably clean and maintain fire protection (143a-144a). It agreed to furnish monthly statements to the railroad and, except for the trifling amount of bunker coal furnished as fuel to tug boats and coal burning steamers (60a), was to be paid on a tonnage basis (144a-145a). The contract described Northern as an independent contractor, and provided that it "shall employ, pay from its own funds, and discharge all persons engaged in the performance of such work, and all such persons shall be and remain the sole employees of the Contractor, and subject to its exclusive authority, supervision, direction and control" (147a).

The operation of the coal pier was conducted in conformity with the contract. The coal cars were placed by the railroad in the thaw house on the pier (in which the coal was thawed out if frozen) and were inspected by the railroad's car inspectors (51a). The railroad delivered the cars to Northern thereby informing it of the quantity and type that was to be dumped, its location in the thaw house, and the expected time of arrival of the vessel into which the coal was to be dumped (54a-57a). Thereafter, the railroad's control over them ceased and was not resumed until after Northern had returned the empty cars to the railroad.

The railroad's agent in charge, who at the time of the accident had an office near the pier, never had anything whatever to do either with the cars or their handling after Northern's men took possession of them in the thaw house, the operation of the dumper or the trimming of coal in the

vessels (33a-35a, 46a, 48a, 50a-58a, 61a, 63a-65a, 69a-70a, 72a-73a) or with maintenance problems (74a-75a, 116a). His only obligation was to give Northern's superintendent the information he needed to do his own work (56a-57a). This information never included instructions as to *how* the job should be done (54a), since Northern's men knew how to do the job better than the railroad's (53a).

Northern kept its own records (70a). Copies of some were furnished to the railroad, but served very little purpose (53a-60a).

On November 15, 1951, petitioner sustained personal injuries while in the course of his employment by Northern as a tipple signalman. His job was to make sure that the car being dumped was properly placed in the dumper, to see that the Northern man riding the car was in a safe position, and then to give the signal to dump (118a-120a).

The petitioner's own testimony showed that he was injured solely as a result of an accumulation of coal at the place where he was working, a condition which necessarily resulted from the coal dumping operation, in which he was engaged (3b-7b). He was fully aware of this condition (12b) and could readily have corrected it by the use of a shovel provided by his employer (3b, 6b, 7b, 8b, 11b).

Northern was obligated under its contract with the railroad to maintain at all times full workmen's compensation coverage (153a).

At the close of petitioner's case the trial judge directed a verdict in favor of the railroad because petitioner's own evidence showed that he was not its employee (136a). The Court of Appeals affirmed for the same reason (Petition, pp. 19-24).

ARGUMENT.

Petitioner has not advanced any valid reasons for the granting of certiorari. He has failed to show why the coverage of the Federal Employers' Liability Act should be extended to persons who are not employees of common carriers by railroad, for whom alone the Act provides a remedy in the circumstances specified in the Act.

1. There Is No Conflict Among the Courts of Appeals.

The Court of Appeals based its decision in this case principally upon the fact that Northern and not the railroad had the right to, and did, exercise control over the manner in which the work was done. Petitioner concedes this (Petition, top of p. 8), and indeed, there is little room for dispute as to the facts, which were all adduced in petitioner's case at the trial. The other recitals on page 8 of the Petition are consistent with the fact that there had to be close cooperation between the two companies; and of course the ebb and flow of coal from the railroad would determine the degree of activity at the coal pier.

The test of who has control of the manner in which the work is being done is a fair one. It is fair because the Act does not merely provide compensation. It requires a showing of negligence as a prerequisite to recovery. If the carrier is to be obliged to respond in damages for its negligence, it should be in a position in which it can extricate itself from such negligence by exerting control over the workplace and the workman. Where, as here, it has employed another for a special purpose, to do a particular work in which that other has special competence and experience, it should not have to answer for omissions on the part of the other.

The test of control was applied in *Chicago, Rock Island & Pacific Ry. Co. v. Bond, Admr. of Turner*, 240 U. S. 449 (1916). In that case, as here, in order to effectuate the

purposes of the contract, close cooperation was required between the independent contractor, who furnished coal, and the railroad company; but nonetheless, as the Court pointed out (240 U. S. 449 at 456), the manner in which the work was done was in the control of the independent contractor. It was held that the administrator of the contractor could not recover under the Federal Employers' Liability Act for the death of the contractor which occurred while he was engaged in the work which he contracted to do.

In addition to this test, the Courts of Appeals, including the Court below in the present case, have considered the manner of payment under the contract, the right to hire and fire, and who paid the premiums for liability and other types of insurance; but the right to control the work being done by the employee has regularly, and quite properly, been considered to be the most important test. This Court declared in *Robinson v. Baltimore & Ohio R. Co.*, 237 U. S. 84, 94 (1914), that the words "employee" and "employed" as used in the Federal Employers' Liability Act should be given their natural meaning as descriptive of the conventional relation of employer and employee. The cases which have either followed or distinguished the *Bond* case (240 U. S. 449) have done so because the facts either met or failed to meet the test of control, which, in turn, has always been the persuasive one in determining independent contractor and employer-employee relationship.

Thus, petitioner's assertion to the contrary notwithstanding (Petition, pp. 15-17), there is no conflict between the decision of the Court below and any decisions in the Court of Appeals for the Sixth Circuit. The result reached in each case depends simply upon the application of the tests mentioned above to the facts of the particular case. This is well illustrated within the Sixth Circuit itself, where the decision in *Stevenson v. Lake Terminal R. Co.*, 42 F. 2d 357 (6th Cir. 1930), which followed the *Bond* case

(240 U. S. 449), was quite different from the Sixth Circuit cases upon which petitioner relies, which distinguished the *Bond* case. The application of the same tests likewise explains the results reached in the other Third Circuit and Ninth Circuit cases cited by petitioner (Petition, p. 15).

Erie R. Co. v. Margue, 23 F. 2d 664 (6th Cir. 1928), is the earliest Sixth Circuit case relied upon by petitioner (Petition, p. 15, footnote 6). The court said (p. 665) that the railroad "undertook to delegate [the duty to maintain its right of way] to a construction company, which was largely organized and controlled by its former employees." In addition to provisions for payment on a cost plus basis, the contract between the railroad and the construction company required the railroad to pay the company the cost of workmen's compensation insurance. The Court held that the purpose of this contract was to avoid the liabilities of the Federal Employers' Liability Act, and that the *Bond* case was distinguishable.

On the other hand, in *Stevenson v. Lake Terminal R. Co.*, 42 F. 2d 357 (6th Cir. 1930), *supra*, p. 6, the manufacturing company's brakeman, who was injured while using equipment borrowed from the railroad company, was found to be under the direction and control of the manufacturing company. The *Margue* case was distinguished and the *Bond* case was followed. In *Cimorelli v. New York Central R. Co.*, 148 F. 2d 575 (6th Cir. 1945), and *Pennsylvania R. Co. v. Roth*, 163 F. 2d 161 (6th Cir. 1947), substantially similar contracts were involved, under which independent contractors conducted loading and unloading operations in the railroad's storage yards. After a careful analysis of the contract in the *Cimorelli* case, the Court found that the railroad had the right to control the details "as to when, where and how the work was to be done" (148 F. 2d 575, 579). In the *Roth* case, the contract was held to be so similar to that in *Cimorelli* that the latter was controlling. In addition, it was quite evident that at the time the contractor's employee was injured, he was actually

being told *how* to do his work by a car inspector of the railroad. In both cases the *Bond* case was distinguished, the Court in *Cimorelli* pointing out (148 F. 2d 575, 579) that in the *Bond* case "there was no immediate supervision of the details by which [the contractor] was to do the work and he was not paid on a cost plus basis."

The cases from the other circuits cited by petitioner (Petition, p. 15, footnote 8) draw the same distinctions. In *Docheney v. Pennsylvania R. Co.*, 60 F. 2d 808 (3d Cir. 1932), where a steel company employee was injured on railroad property, the Federal Employers' Liability Act was held not to apply because ". . . the actual control of the Steel Company's employees in doing the work was retained by their employer, the Steel Company" (60 F. 2d 808, 810).

The same result was reached with regard to a Pacific Fruit Express company employee in *Gaulden v. Southern Pacific Co.*, 78 F. Supp. 651, affd. per curiam 174 F. 2d 1022 (9th Cir. 1949), the court pointing out (78 F. Supp. 651, 656): "No right of control over the manner and means of performance was reserved to the railroads."

In *Norman v. Spokane-Portland & Seattle Ry. Co.*, 101 F. Supp. 350, affd. per curiam 192 F. 2d 1020 (9th Cir. 1951), cert. den. 342 U. S. 945, in which a contractor's employee was injured while engaged in bridge repair, the trial court found that the contractor "had unrestrained power to direct the manner and method of doing the work", and that the employee was acting under the direction and control of the contractor and not of the railroad. The action under the Federal Employers' Liability Act was dismissed.

In *Shaw v. Monessen, Southwestern Ry. Co.*, 200 F. 2d 841 (3d Cir. 1953), the Court carefully considered whether the injured plaintiff was a railroad or a Steel Company employee, pointing out that the question of who has control of the details of the plaintiff's work is the most important consideration of all (200 F. 2d 841, 843). Since control

was in the steel company, the plaintiff could not recover against the railroad under the Federal Employers' Liability Act.

The same result was reached in *Dougall v. Spokane-Portland & Seattle Ry. Co.*, 207 F. 2d 843 (9th Cir. 1953), cert. den. 347 U. S. 904, which involved an employee of a construction company engaged to perform certain work on the railroad's right of way. The Court concluded that the railroad did not exercise control of the manner of performance of the work, and had no right to under the contract.[1]

Petitioner mentions in particular *Pennsylvania R. Co. v. Barlion*, 172 F. 2d 710 (6th Cir. 1949), as being in conflict with the present decision (Petition, pp. 15-17), not only with regard to the test of control, but also because in both cases a service covered by the railroad's tariff was involved. The latter factor is considered *infra* at page 10. With regard to the control being exercised, it is sufficient to point out that the Court of Appeals held in that case (172 F. 2d 710 at p. 712) that the railroad actually had the right to control the manner in which the work was to be done, and thus the *Barlion* case is no different from the other Sixth Circuit decisions upon which petitioner relies.

Petitioner also stresses *Downs v. Baltimore & Ohio R. Co.*, 345 Ill. App. 118, 102 N. E. 2d 537 (1951) (Petition, p. 17), which, on its facts, is quite like the present case. However, it is submitted that that case was wrongly decided because of a failure to apply the universally accepted tests referred to above. The authorities upon which reliance was placed in that case were misread. Inapplicable cases arising under statutes other than the Federal Employers' Liability Act were relied upon. Throughout its opinion the Illinois court completely overlooked the dis-

1. The state court cases referred to by petitioner (Petition, p. 12, footnote 6) generally apply the same tests as the Courts of Appeals cases. Exceptions are *Klar v. Erie R. Co.*, 118 Ohio 612, 162 N. E. 793 (1928), which was a "moment of injury" case made obsolete by the 1939 amendments to the Federal Employers' Liability Act, and *State v. Bates & Rogers Construction Co.*, 91 Wash. 181, 157 P. 482 (1916), which was a suit by the state for workmen's compensation premiums.

tinction, which has consistently been observed by the federal courts, between the right on the part of the railroad to tell the contractor *what* has to be done, and the right to tell the contractor *how* to do it. The fact that an intermediate court in Illinois reached a novel result should not be persuasive in dealing with the present petition.

2. The Court Below Correctly Interpreted the Federal Employers' Liability Act.

Petitioner suggests that, quite apart from the test of control, the Act should be applicable wherever the service being performed by the independent contractor is covered by the railroad's tariff and is being done with or upon the railroad's property.

This argument assumes that merely because the loading and unloading of coal was covered by the railroad's tariff, the operation, however intricate and far removed from usual railroading, nevertheless may not be delegated by the railroad to a contractor skilled in such an operation. However, the photograph identified and introduced by plaintiff as P-1 in the District Court (16a, 135a), and certified as part of the record, shows the operation involved, seen from the end of the coal pier facing inland. The thaw house is in the background between the two loading towers. It is apparent that those who operate this plant must necessarily be specialists of a sort different from employees of a railroad company. The dumper has always been operated by Northern, and was built to replace an earlier pier which Northern had likewise operated. The size and complexity of the machinery is such that independent help in operating it is fully justified. Railroad employees are not trained for this operation. It is patently more than just another railroad function. It is a highly specialized operation being performed for the railroad company and is quite different from the simpler but

less efficient loading procedures which sometimes the railroad company is equipped to carry out.

In *Robinson v. Baltimore & Ohio R. Co.*, 237 U. S. 84 (1914) (*supra*, p. 6), this Court held that an injured employee of the Pullman Company could not recover under the Federal Employers' Liability Act even though the injured employee was working on the railroad's train, the service performed was subject to the exigencies of rail transportation, and the Pullman employees were bound by the rules and regulations of the railroad company. It was held there that the contract between the plaintiff and the Pullman Company was not void under the provisions of § 5 of the Act (45 U. S. C. § 55). The same result was also reached with regard to an express company employee in *Wells Fargo & Co. v. Taylor*, 254 U. S. 175 (1920).

Petitioner has directed this Court's attention to *Duncan v. Thompson*, 315 U. S. 1 (1942), wherein the history and purpose of § 5 of the Act are discussed. It is clear, however, from the discussion in that case that the purpose of § 5 was to protect employees from employer-employee agreements which might result in depriving railroad employees of the right to sue under the Act.[2]

Efforts have been made in some cases to assert a violation of § 5 when the existence of the other tests of independent contractor relationship have been is dispute. Where the court, on the basis of the normal tests which we have discussed, has found that a bona fide independent contractor relationship exists, the argument has been rejected, as was

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2. At the time that the 1939 amendments to the Federal Employers' Liability Act were under discussion in the Judiciary Committee of the Senate, it was proposed to amend §§ 1 and 2 to include "every express company, freight-forwarding company, and sleeping car company", as well as every common carrier by railroad. However, spokesmen for the Brotherhood of Railway Clerks, representing the Railway Express employees and the American Federation of Labor, informed Senator Neely that neither the Railway Express employees nor the Pullman employees were desirous of being included within the Bill. As a result, Senator Neely suggested that the Pullman Company and the express companies be excluded, and this was done. *Hearings before a Subcommittee of the Committee on the Judiciary, U. S. Senate, 76th Congress, 1st Ses. on S. 1708*, pp. 1-2, 57-58 (1939).

done in *Chicago, R. I. & Pacific Ry. Co. v. Bond, Admr. of Turner*, 240 U. S. 449 (1916), discussed *supra*, pp. 5-6. See also *Stevenson v. Lake Terminal R. Co.*, 42 F. 2d 357 (6th Cir. 1930), and *Dougall v. Spokane-Portland & Seattle Ry. Co.*, 207 F. 2d 843 (9th Cir. 1953), cert. den. 347 U. S. 904. On the other hand, in *Erie R. Co. v. Margue*, 23 F. 2d 664 (6th Cir. 1928), the effort of the railroad to transfer control of the particular operation to its former employees in the guise of a new corporation was so transparent an effort to evade its responsibility under the Act that the court found that a violation of § 5 existed.

The proper rationale in such cases has been suggested by Chief Judge Fee, now of the Court of Appeals for the Ninth Circuit, in his opinion in *Norman v. Spokane-Portland & Seattle Ry. Co.*, 101 F. Supp. 350, affd. *per curiam* 192 F. 2d 1020 (9th Cir. 1951), cert. den. 342 U. S. 945. Plaintiff, who was employed by a construction company, was injured while engaged in the maintenance of the railroad's bridges. He contended that the railroad company could not delegate the duty to maintain its bridges and that therefore he was within the coverage of the Federal Employers' Liability Act. Judge Fee pointed out that although there might be a duty owed to passengers by the railroad to maintain safe bridges, this obligation did not serve to extend the coverage of the Federal Employers' Liability Act to injuries sustained by an employee of the contractor which undertook to perform such maintenance. Similarly in the present case, although the railroad has voluntarily made an agreement with its customer to dump its coal, which it was not obligated to do as part of its common carrier duty, this undertaking to dump is owed to the customer alone, and is not effective to extend the coverage of the Federal Employers' Liability Act to an employee of someone else who is doing the dumping. The duty should be delegable to outside contractors in the same manner that the railroad is entitled to bring in carpenters to build a station, masons

to build a bridge or truckers to deliver freight. If any of the firms which are brought in to perform such work are given the power to control the operations, they should be considered independent contractors and their employees not to be employees of the carrier or within the terms of the Federal Employers' Liability Act.

The petitioner has pointed out that the railroad, because of its common carrier obligation, may terminate the contract for failure of the contractor to perform (148a-149a). From this the Court is asked to infer that the railroad exerts control over Northern. Actually such a provision should be written into any carefully drafted contract requiring performance. It is particularly important here because the railroad, being a common carrier, cannot brook delay or failure in its transportation service. It gives the railroad no control over Northern. It only gives it the contractual right to look elsewhere for help if Northern should fail to perform.

It has been expressly recognized, in the *Bond* case (240 U. S. 449) and the cases which have followed it, that control over the details of how the work is to be done is not inconsistent with close cooperation between the independent contractor and the railroad (see, for example, the discussion in *Dougall v. Spokane-Portland & Seattle Ry. Co.*, 207 F. 2d 843 at pp. 846 and 847). As Judge McLaughlin, writing for the Court below, pointed out (Petition, p. 23), "the cooperation and assistance furnished by the railroad helped enormously in the successful accomplishment of Northern's task but it was Northern who controlled the way it performed its job". This Court will take judicial notice that cooperation between contracting parties is a normal incident to business relationships. It would have to be present in the case of the carpenter or the trucker referred to above. No building could be erected or bridge or tunnel built without the closest cooperation between the contractor and the subcontractor to insure the achievement of the de-

sired result.[3] Such cooperation and overall supervision does not, in those situations, change the relationship of the parties, or make the employees of a bona fide independent contractor, performing a specialized service, ipso facto employees of the railroad company solely for the purpose of giving them a right to sue under an Act designed to provide a remedy for an entirely different class of employees. The petitioner is not and never was an employee of the railroad under any recognized test of employer-employee relationship and to declare that such a relationship exists, not because of what the parties have done but because of the consequences that will flow from such a declaration, is not justified by any provision of the statute which the petitioner has invoked.

CONCLUSION.

There is no basis for the granting of the petition for certiorari in this case and the writ should be denied.

Respectfully submitted,

PHILIP PRICE,
ARTHUR E. NEWBOLD, III,
BARNES, DECHERT, PRICE, MYERS & RHOADS,
Attorneys for Respondent.

3. Petitioner, at p. 6, appears to suggest that in the present case the contract was not bona fide because ". . . the Railroad performs this operation with its own employees at all its other coal piers (10a) . . ." However, this statement is not correct. A reference to p. 10a shows that at only two places on the railroad's system is coal transferred by the railroad's own employees. One is by a conveyor and the other is by a crane to and from river barges. Both the machinery used and the nature and extent of the entire operation is entirely different from the operation and maintenance of a great coal dumper and mechanical trimmers as in this case. The special skill and training required to conduct the operation in Philadelphia where ocean going vessels are loaded, bears no relation to the river barge operation where mere conveyors and clam shell buckets are adequate. Petitioner's statement of fact is therefore inaccurate, and no inferences should be drawn from it.